

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|------------------------|---|------------------------------|
| WALTER S. PATRICK, |) | |
| |) | No. CV-07-3099-CI |
| Plaintiff, |) | |
| |) | ORDER GRANTING PLAINTIFF'S |
| v. |) | MOTION FOR SUMMARY JUDGMENT |
| |) | AND REMANDING FOR ADDITIONAL |
| MICHAEL J. ASTRUE, |) | PROCEEDINGS PURSUANT TO |
| Commissioner of Social |) | SENTENCE FOUR 42 U.S.C. § |
| Security, |) | 405(g) |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 20.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Carol A. Hoch represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 5.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

Plaintiff Walter S. Patrick (Plaintiff) protectively filed for Supplemental Security Income and disability insurance benefits (DIB) on January 4, 2005. (Tr. 52, 282.) Plaintiff alleged an onset date of February 10, 2004, on the DIB application and June 30, 2004, on the SSI application. (Tr. 52, 282.) Benefits were denied initially and

1 on reconsideration. (Tr. 287, 29.) Plaintiff requested a hearing
2 before an administrative law judge (ALJ), which was held before ALJ
3 Ralph Jones on March 8, 2007. (Tr. 327-67.) Plaintiff was
4 represented by counsel and testified at the hearing. The ALJ denied
5 benefits (Tr. 16) and the Appeals Council denied review. (Tr. 6.)
6 The instant matter is before this court pursuant to 42 U.S.C. §
7 405(g).

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing
10 transcripts, the ALJ's decision, and the briefs of Plaintiff and the
11 Commissioner, and will therefore only be summarized here.

12 At the time of the hearing, Plaintiff was 58 years old. (Tr.
13 330.) He has at least four years of college education. (Tr. 82.)
14 Plaintiff has worked as a substance abuse program coordinator and has
15 been self-employed as a medieval coin replica maker. (Tr. 78-79.)
16 Plaintiff alleged his ability to work is limited by depression and
17 chronic pain which limits his ability to stand, walk, lift, and sit.
18 (Tr. 78.)

19 **STANDARD OF REVIEW**

20 Congress has provided a limited scope of judicial review of a
21 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the
22 Commissioner's decision, made through an ALJ, when the determination
23 is not based on legal error and is supported by substantial evidence.
24 *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
25 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
26 determination that a plaintiff is not disabled will be upheld if the
27 findings of fact are supported by substantial evidence." *Delgado v.*

1 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)).
2 Substantial evidence is more than a mere scintilla, *Sorenson v.*
3 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
4 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.
5 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
6 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence
7 as a reasonable mind might accept as adequate to support a
8 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
9 (citations omitted). "[S]uch inferences and conclusions as the
10 [Commissioner] may reasonably draw from the evidence" will also be
11 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
12 review, the Court considers the record as a whole, not just the
13 evidence supporting the decision of the Commissioner. *Weetman v.*
14 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v. Harris*,
15 648 F.2d 525, 526 (9th Cir. 1980)).

16 It is the role of the trier of fact, not this Court, to resolve
17 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
18 supports more than one rational interpretation, the Court may not
19 substitute its judgment for that of the Commissioner. *Tackett*, 180
20 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
21 Nevertheless, a decision supported by substantial evidence will still
22 be set aside if the proper legal standards were not applied in
23 weighing the evidence and making the decision. *Browner v. Sec'y of*
24 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
25 if there is substantial evidence to support the administrative
26 findings, or if there is conflicting evidence that will support a
27 finding of either disability or nondisability, the finding of the

1 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
2 1230 (9th Cir. 1987).

3 SEQUENTIAL PROCESS

4 The Social Security Act (the "Act") defines "disability" as the
5 "inability to engage in any substantial gainful activity by reason of
6 any medically determinable physical or mental impairment which can be
7 expected to result in death or which has lasted or can be expected to
8 last for a continuous period of not less than twelve months." 42
9 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
10 a Plaintiff shall be determined to be under a disability only if his
11 impairments are of such severity that Plaintiff is not only unable to
12 do his previous work but cannot, considering Plaintiff's age,
13 education and work experiences, engage in any other substantial
14 gainful work which exists in the national economy. 42 U.S.C. §§
15 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
16 consists of both medical and vocational components. *Edlund v.*
17 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

18 The Commissioner has established a five-step sequential
19 evaluation process for determining whether a claimant is disabled. 20
20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
21 engaged in substantial gainful activities. If the claimant is engaged
22 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
23 404.1520(a)(4)(I), 416.920(a)(4)(I).

24 If the claimant is not engaged in substantial gainful activities,
25 the decision maker proceeds to step two, which determines whether the
26 claimant has a medically severe impairment or combination of
27 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If

1 the claimant does not have a severe impairment or combination of
2 impairments, the disability claim is denied.

3 If the impairment is severe, the evaluation proceeds to the third
4 step, which compares the claimant's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
8 1. If the impairment meets or equals one of the listed impairments,
9 the claimant is conclusively presumed to be disabled.

10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents the claimant from
13 performing work he or she has performed in the past. If plaintiff is
14 able to perform his or her previous work, the claimant is not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, the claimant's residual functional capacity ("RFC")
17 assessment is considered.

18 If the claimant cannot perform this work, the fifth and final
19 step in the process determines whether the claimant is able to perform
20 other work in the national economy in view of his or her residual
21 functional capacity and age, education and past work experience. 20
22 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
23 U.S. 137 (1987).

24 The initial burden of proof rests upon the claimant to establish
25 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
26 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
27 1111, 1113 (9th Cir. 1999). The initial burden is met once the
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1 claimant establishes that a physical or mental impairment prevents him
2 from engaging in his or her previous occupation. The burden then
3 shifts, at step five, to the Commissioner to show that (1) the
4 claimant can perform other substantial gainful activity, and (2) a
5 "significant number of jobs exist in the national economy" which the
6 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
7 1984).

8 **ALJ'S FINDINGS**

9 At step one of the sequential evaluation process, the ALJ found
10 Plaintiff has not engaged in substantial gainful activity since
11 February 10, 2004, the alleged onset of disability. (Tr. 18.) At
12 steps two and three, he found Plaintiff has the severe impairments of
13 osteoarthritis and degenerative disc disease, but the impairments do
14 not meet or medically equal one of the listed impairments in 20
15 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 18.)
16 The ALJ also found Plaintiff's depression does not result in
17 significant work-related functional limitations and is not a severe
18 impairment. (Tr. 19.) The ALJ then determined:

19 [C]laimant has the residual functional capacity to lift 20
20 pounds occasionally and 10 pounds frequently. He can stand
21 and walk 6 hours out of an 8-hour day and sit 6 hours out of
22 an 8-hour day. He is limited to occasional pushing and
23 pulling with the lower extremities. He cannot climb
24 ladders, ropes, or scaffolds. He can occasionally climb
25 ramps and stairs, stoop kneel [sic], crouch and crawl. He
26 can frequently balance.

27 (Tr. 19.) At step four, the ALJ stated that Plaintiff is unable to
28 perform any past relevant work.¹ (Tr. 22.) Based on the Plaintiff's

¹ This is the plain language of the finding. As discussed below,
the intended meaning of the finding is ambiguous.

1 age, education, work experience and residual functional capacity, the
2 ALJ found that Plaintiff has acquired work skills from past relevant
3 work that are transferable to other occupations with jobs existing in
4 significant numbers in the national economy. (Tr. 23.) As such, the
5 ALJ found Plaintiff has not been under a disability as defined in the
6 Social Security Act from February 10, 2004, through the date of the
7 decision.

8 ISSUES

9 The question is whether the ALJ's decision is supported by
10 substantial evidence and free of legal error. Plaintiff argues the
11 ALJ erred at step five of the analysis by (1) failing to identify
12 specific jobs available in significant numbers which the Plaintiff
13 could perform in light of his specific functional limitations; (2)
14 determining Plaintiff has transferable skills; and (3) providing an
15 incomplete hypothetical to the vocational expert. (Ct. Rec. 14 at 12-
16 17.) Plaintiff further argues the ALJ erred by improperly rejecting
17 the opinions of Plaintiff's treating and examining sources and
18 Plaintiff's own testimony. (Ct. Rec. 14 at 17.) Defendant argues the
19 ALJ gave clear and convincing reasons for the credibility assessment,
20 properly considered medical source opinions, properly concluded
21 Plaintiff could perform past relevant work, and that the error at step
22 five was harmless.

23 DISCUSSION

24 Defendant concedes the ALJ's step five finding was deficient.
25 (Ct. Rec. 21 at 22.) The ALJ noted the vocational expert testified
26 that Plaintiff's skills in record keeping, marketing and sales are
27 transferable to light exertion, semi-skilled work. (Tr. 23.) The ALJ
28

1 cited the Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart
2 P, Appendix 2 and concluded that, based on a residual functional
3 capacity for the full range of light work and considering the
4 Plaintiff's age, education and transferable work skills, a finding of
5 "not disabled" is directed by Medical-Vocational Rule 202.07. (Tr.
6 23.) However,

7 When the issue of skills and their transferability must be
8 decided, the adjudicator or ALJ is required to make certain
findings of fact and include them in the written decision.

9 . . .

10 When a finding is made that a claimant has transferable
11 skills, the acquired work skills must be identified, and
12 specific occupations to which the acquired work skills are
13 transferable must be cited in the State agency's
determination or ALJ's decision. . . . It is important that
these findings be made at all levels of adjudication to
clearly establish the basis for the determination

14 S.S.R. 82-41. Although the ALJ identified the Plaintiff's
15 transferable skills, the ALJ neither identified occupations to which
16 those skills would be transferable nor established that such
17 occupations are available in significant numbers in the national
18 economy. (Tr. 23.) Thus, the ALJ erred.

19 Defendant argues that the error at step five is harmless because
20 the ALJ made a step four finding that Plaintiff could perform his past
21 relevant work as a program coordinator. (Ct. Rec. 21 at 22.) If the
22 ALJ did indeed make an adequate step four finding that Plaintiff can
23 perform past relevant work, the error at step five is harmless error
24 because it was not a required step. See *Stout v. Comm'r, Soc. Sec.*
25 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (error is harmless when it
26 occurs in a step the ALJ was not required to perform); *Matthews v.*
27 *Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (any error in hypothetical was

1 harmless in light of the step four conclusion that claimant could
2 return to past work). However, Plaintiff asserts the ALJ found he
3 could not return to past relevant work and that the ALJ erred by
4 identifying Plaintiff's past work as a program coordinator as "past
5 relevant work." (Ct. Rec. 23 at 9-10.)

6 In finding that an individual has the capacity to perform past
7 relevant work, the ALJ's decision must contain among the findings a
8 finding of fact that the individual's RFC would permit a return to his
9 past job or occupation. S.S.R. 82-62. Here, there is no such
10 finding. Throughout the decision, the ALJ enumerated findings in bold
11 font before discussing them in detail. With regard to past relevant
12 work, the ALJ stated:

13 **6. The claimant is unable to perform any past relevant work**
14 **(20 CFR 404.1565 and 416.965).**

15 The claimant has past relevant work as a program
16 coordinator. This is sedentary exertion, skilled work. The
17 vocational expert testified that given the claimant's
18 residual functional capacity, he is capable of performing
19 his past relevant work as a program coordinator.

20 (Tr. 22.) The bolded language appears to be a clear finding that
21 Plaintiff is not able to perform past relevant work. However,
22 Defendant argues the text after the bolded language indicates the ALJ
23 actually intended to find that Plaintiff is able to perform past
24 relevant work. (Ct. Rec. 21 at 20.) After the past relevant work
25 finding, the ALJ added: "Alternatively, as discussed below, there are
26 other jobs existing in significant numbers in the national economy he
27 could perform given his age, education, work experience and residual
28 functional capacity." (Tr. 22-23.) The word "alternatively" is also
inconsistent with the bolded finding. Defendant argues the past

1 relevant work finding is standardized language which was not modified
2 to match the text below it, and is therefore a harmless typographical
3 error. (Ct. Rec. 21 at 20.)

4 The language of the past relevant work finding and the
5 explanatory text are inconsistent, creating an ambiguity. The court
6 cannot, as the Defendant urges (Ct. Rec. 21 at 20-21), treat the
7 ambiguity at step four as harmless error. Harmless error only occurs
8 if the error is inconsequential to the ultimate nondisability
9 determination. See *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th
10 Cir. 2006); *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56
11 (9th Cir. 2006). Errors that do not affect the ultimate result are
12 harmless. See *Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir. 2007);
13 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v. Sec'y*
14 *of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984). In this
15 case, the ambiguity is critical to the ultimate nondisability
16 determination. When the ambiguity is considered in the light most
17 favorable to the Plaintiff, he is not able to perform past work.
18 Thus, a proper step five analysis is essential to the final outcome.
19 Since the ALJ erred at step five, the matter must be remanded for
20 clarification of the step four determination and, if appropriate, a
21 proper step five analysis.

22 It is also noted that Plaintiff argues the ALJ erred at step four
23 by treating Plaintiff's work as a program coordinator as past relevant
24 work. Plaintiff asserts he did not perform the work long enough to
25 learn it and that it was a temporary position for which he was not
26 credentialed. (Ct. Rec. 23 at 10.) The ALJ did not explain the basis
27 for his conclusion that the program supervisor position is past
28

1 relevant work. (Tr. 22.) On remand, the ALJ should analyze and
2 explain the basis for categorizing Plaintiff's work as program
3 coordinator as past relevant work.

4 The court does not reach Plaintiff's other assignments of error
5 because the errors at steps four and five require remand.

6 **CONCLUSION**

7 The ALJ's decision is not supported by substantial evidence and
8 free of legal error. Remand is the proper remedy. On remand, the ALJ
9 will weigh and analyze the opinions of the treating and examining
10 providers and the other medical evidence, reevaluate Plaintiff's
11 credibility, determine Plaintiff's residual functional capacity,
12 analyze Plaintiff's past work, and obtain vocational expert testimony
13 if appropriate. Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
16 **GRANTED**. The matter is remanded to the Commissioner for additional
17 proceedings pursuant to sentence four 42 U.S.C. 405(g).

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is
19 **DENIED**.

20 3. An application for attorney fees may be filed by separate
21 motion.

22 The District Court Executive is directed to file this Order and
23 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
24 be entered for Plaintiff and the file shall be **CLOSED**.

25 DATED January 6, 2009.

26
27 S/ CYNTHIA IMBROGNO
28 UNITED STATES MAGISTRATE JUDGE

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO
SENTENCE FOUR 42 U.S.C. § 405(g)-11